

STATE OF MICHIGAN
COURT OF APPEALS

BRYAN MICHAEL RACZKOWSKI,

Plaintiff/Counter-Defendant-
Appellant,

v

ASHLEY DAWN CORRELL, f/k/a ASHLEY
DAWN RACZKOWSKI,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED
November 14, 2013

No. 313423
Mason Circuit Court
LC No. 07-000354-DM

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

This custody dispute arose after the Department of Human Services (DHS) initiated child protective proceedings against defendant Ashley Dawn Correll, the mother of OR. The child protective proceedings stemmed from the drowning death of OR's half-sister, HH, while in the care of Correll's boyfriend, Matthew McCarthy. During the course of the child protective proceedings plaintiff Bryan Raczowski filed this action seeking custody of his daughter.

Despite that at the custody trial's conclusion OR had resided with Raczowski for approximately 18 months, the trial court found that OR's established custodial environment existed solely with Correll. The trial court further found that three of the best interest factors favored Correll, who elected to remain in a relationship with McCarthy, while none favored Raczowski.

The trial court's ruling concerning OR's established custodial environment constitutes harmless error. However, because the trial court's findings concerning several best interest factors contravened the great weight of the evidence, we reverse and remand for a new best interest hearing.

I. UNDERLYING FACTS AND CHILD PROTECTIVE PROCEEDINGS

Correll and Raczowski married in 2005 and divorced in 2008. OR, the only child of their marriage, was born in 2006. She is now seven years old. Correll and Raczowski shared OR's legal and physical custody until she started school. For the 2009 school year, the parties

agreed that OR would reside primarily with Correll while Raczkowski retained alternate weekend parenting time.

Meanwhile, both parents entered into other relationships. In 2008, Raczkowski married Sara, who had two children close in age to OR. This marriage produced a son. Correll moved in with and later married Lucky Hatt, and gave birth to two additional children: HH and WH. In December 2010, Correll left Hatt and moved in with Matthew McCarthy. Because McCarthy lived some distance from OR's school, OR stayed with her maternal grandparents on school nights.

On February 10, 2011, Correll left 12-month-old HH in McCarthy's care while she ran errands. During Correll's absence, McCarthy gave HH a bath. When Correll returned, she observed that HH appeared to be asleep in her crib. Fifteen minutes later Correll heard "a high-pitched squeal." Correll first thought that HH was having a nightmare. HH made "a higher, louder, longer squeal" and Correll called 911.

On arrival at the Gratiot Medical Center, HH was in respiratory failure and had fixed, dilated pupils. She was transported by helicopter to the University of Michigan Medical Center. Physicians at U of M determined that HH was comatose and lacked purposeful brain function. They consulted Dr. Bethany Mohr, a specialist in general and child abuse pediatrics.

Dr. Mohr examined HH the next day. In addition to HH's coma, Dr. Mohr observed that HH had bruising on her forehead and under her chin and reddening of her right cheek consistent with a burn. An x-ray revealed a nonacute fracture of HH's forearm.

Dr. Mohr interviewed McCarthy and Correll to obtain a history of the events preceding HH's hospitalization. Mohr dictated a lengthy note regarding these interviews. She recorded that McCarthy bathed HH after the child "lifted up the toilet seat and was splashing around in the toilet water." McCarthy told Mohr that he put HH "in the tub and scrubbed her." Mohr's note continued:

I, specifically, asked Mr. McCarthy if anything happened while [HH] was in the tub and Mr. McCarthy denied that [HH] had fallen while she was in the tub. He denied any trauma whatsoever or anything out of the ordinary happening and stated that [HH] was her "normal fun self" while she was in the tub. At no time did Mr. McCarthy state that [HH] fell underneath the water or that her face, at any time, was in the water. After taking her bath, Mr. McCarthy said that he laid [HH] down for a nap and she did not cry. He said that she is "famous for talking herself to sleep" and, typically, stands up and jumps in her crib prior to laying down and going to sleep. Mr. McCarthy referred to [HH] as a "party animal." After Mr. McCarthy put [HH] into her crib he stated that she "got quiet" and he thought she had fallen asleep.

Correll told Dr. Mohr that McCarthy had texted her about HH's encounter with the toilet water and sent her a picture of HH in the bathtub. When Correll returned home, McCarthy reported to Correll that HH had "'slipped under the water for less than 5 seconds'" while she was in the bathtub.

HH died on February 11, after life support was withdrawn. Dr. Mohr concluded that the child's death was likely due to drowning.¹ She based her conclusion on laboratory findings demonstrating lack of oxygen to HH's brain and that HH had swallowed 1.5 to 2 liters of water shortly before losing consciousness. Mohr further opined that HH was "either a victim of physical abuse and/or neglect (i.e. left unattended in the bathtub, failure to seek medical care after injury sustained) leading to her severe brain injury." She specifically noted that "due to the severity of [HH]'s brain injury, the inciting event would have had to occur very close to the time that [HH] became ill and was unresponsive." In a subsequent letter to the Montcalm circuit court, Mohr explained her conclusions in more detail:

Most significant was [HH]'s initial sodium ("salt") levels of 109 and 104. A normal sodium level is approximately 135-145. [HH]'s cerebral edema ("brain swelling") with subsequent herniation was likely due to a combination of anoxic ("lack of oxygen") injury and hyponatremia ("low salt levels").

Based on the [sic] [HH]'s lab findings, MRI findings, clinical status, and the history that [HH] was in a bathtub filled with water prior to her clinical deterioration, [HH] was a victim of drowning.

Based on the histories I obtained from Matthew McCarthy and Ashley [Correll], Mr. McCarthy was left alone to care for [HH] in the afternoon on Thursday 2/10/10; prior to Ms. [Correll] finding [HH] apparently seizing and unresponsive later that afternoon. Per Ms. [Correll], [HH] was "fine" when Ms. [Correll] left [HH] in Mr. McCarthy's care.

Please note that I obtained histories from both Mr. McCarthy and Ms. [Correll], separately. Upon asking Mr. McCarthy if anything had happened while [HH] was in the bathtub or when she was playing in the toilet, Mr. McCarthy never reported that [HH]'s face/head, at any time, went under or into the water; "nothing unusual happened." However, Ms. [Correll] reported that Mr. McCarthy told her that [HH] had "slipped under the bathwater for less than 5 seconds."

[HH]'s extremely low sodium level indicates that [HH] swallowed at least approximately 1.5-2 L of fresh water over a short period of time. Of note, [HH] has no medical history to explain such low sodium levels.

Two possible scenarios exist to explain the cause of [HH]'s death:

1. [HH] was intentionally submerged in water leading to anoxic brain injury and ingestion of a significant amount of fresh water causing her sodium levels to markedly decrease. In this case, [HH]'s death would be the result of physical abuse.

¹ An autopsy was performed but the report was not filed with the trial court. Dr. Mohr was the only physician who testified regarding HH's cause of death.

2. [HH] was found submerged in water after being left unsupervised. In order to ingest the amount of water necessary to lower [HH]'s sodium level to 104-109, she would have been neurologically impaired. In this case, Mr. McCarthy would have found [HH] essentially unconscious in the bathtub and any layperson would have known that [HH] was in need of emergent medical care. In this case, [HH]'s death would be a result of neglect and medical neglect due to Mr. McCarthy's failure to seek immediate medical care for [HH].

On February 12, 2011, the DHS filed a petition in Montcalm County for the removal of OR and WH from Correll's home and for the termination of Correll's parental rights. OR was initially placed in foster care, and on March 31, 2011, she was placed with Raczkowski.²

In August 2011, Correll admitted to a number of allegations in an amended petition which no longer sought termination of her parental rights. During her colloquy with the court Correll admitted awareness that her daughter's cause of death was drowning:

The Court: Okay. There's a—then on February 10th your daughter [HH] was left in the care and custody of Mr. McCarthy?

Ashley [Correll]: Correct, yes.

The Court: And that was at what address, ma'am?

Ashley [Correll]: 3833 Deaner Road, Edmore, Michigan.

The Court: Okay. And while she was in his care and custody, did she die?

Ashley [Correll]: No.

The Court: Okay. She died in Ann Arbor?

Ashley [Correll]: Yes.

The Court: And what date was that?

Ashley [Correll]: February 11th.

The Court: And that was this year?

Ashley [Correll]: Yes.

² WH was also placed in foster care, and then with his father. Tragically, WH died in a car accident in January 2012, while in his father's care.

The Court: And for the record, can you tell me what the cause of death was?

Ashley [Correll]: It was caused by fresh water drowning or fresh water in her lungs.

The Court: And medical help was not requested for [HH] immediately?

Ashley [Correll]: Um, I wasn't there.

The Court: Okay. So medical treatment wasn't sought for the child until after you arrived?

Ashley [Correll]: Correct, yes.

The Court: Again, that was when you arrived at the Deaner Road address in Edmore?

Ashley [Correll]: Yes.

The Montcalm circuit court took jurisdiction of OR and WH and ordered that Correll undergo a psychological evaluation and participate in other services. Whether Correll complied with all requirements of her parent agency agreement remains unclear. On July 31, 2012, the Montcalm circuit court terminated its jurisdiction over OR based on a stipulation reflecting Raczkowski's temporary custody of the child and that the Mason circuit court would render a further custody determination. Notably, the Montcalm circuit court did not terminate jurisdiction because it deemed Correll a fit custodian who could keep her child safe.

II. THE CUSTODY TRIAL

Raczkowski petitioned the Mason circuit court for OR's full custody. The Mason circuit court conducted a three-day custody trial concluding in August 2012. By the time the trial ended, OR had been living with Raczkowski, his wife, and their other children for 18 months. During most of this interval Correll had supervised parenting time consisting of several hours each week. When the trial commenced, her parenting time expanded to one night every other weekend, supervised by her parents.

Three DHS workers testified at the custody trial concerning their involvement in the child protective proceedings. Renee Hyde, a child protective services (CPS) investigator, transported OR from Ann Arbor to a foster home. During the journey, Hyde conducted a forensic interview. OR revealed that she did not like McCarthy and began crying. Hyde performed a second interview in OR's foster home. OR revealed that when HH got in trouble "she got spanked" and denied that Correll "did the spanking."

Jessica Szczerowski served as OR's foster care caseworker for 13 months. She developed Correll's treatment plan, which included a psychological evaluation and parenting classes. According to Szczerowski, the October 2011 psychological evaluation revealed "some significant emotional mental health issues that needed to be addressed," "a diagnosis of Mild

Borderline Personality Disorder,” and “some concerns of substance abuse.” Although Correll had recently started counseling with a self-selected therapist, Szczerowski testified that the counselor failed to provide updated reports.

Szczerowski expressed concern that Correll failed to accept any responsibility “for why her kids came into care,” and that “because she still is with Mr. McCarthy, [OR] is not safe in the home due to the medical neglect.” She opined that Raczkowski should have custody because:

[OR] has been placed in his care for over a year now. There have been no major concerns. He has been able to show that he can provide stability for [OR]. And I also do have concerns still regarding Ms. Correll and her relationship with Mr. McCarthy and some of the mental health issues that were stated in the psychological.

On cross-examination, Szczerowski agreed that Correll had behaved appropriately during her supervised parenting time, that she and OR were “very bonded” to each other, and that OR would cry when the visits ended.

Kristina Syjud, a Child Service’s Specialist, assumed responsibility as OR’s foster care worker in April 2012. She made monthly visits with OR in Raczkowski’s home and also visited with Correll. Syjud explained that she took over for Szczerowski at the suggestion of her supervisor, who asked for Syjud’s input because “[OR] had been in care for a significant amount of time at that point and they felt that a fresh perspective may be helpful[.]”

Syjud expressed concern that Correll had not participated in the type of therapy recommended by the psychologist nor had she undergone random drug testing. According to Syjud, OR had adjusted well to living with her father, referred to Sara as “mommy,” and never expressed complaints about living with the Raczkowski family. She explained, “[a]ll of the interactions I’ve seen during home visits have been very positive and appropriate.” Like Szczerowski, Syjud opined that OR should be permanently placed with her father rather than Correll. She reasoned:

Mr. McCarthy needed to seek medical treatment for [HH]. The medical examiner’s reports indicated that [HH] died as a result of drowning and medical attention was not sought immediately after that which led ultimately to [HH]’s death.

And . . . Ms. Correll, does not seem to take responsibility or understand that Mr. McCarthy needed to seek that medical attention and has stated that she doesn’t feel like he did anything wrong in those instances and that if she had to do it all over again, she would do the same things leaving her daughter in Mr. McCarthy’s care where he did not appropriately seek medical attention after a drowning or near drowning that resulted in her youngest daughter’s death.

Dr. Mohr testified at length regarding HH’s death. She began by recounting the bruising, facial redness and arm fracture detected on her initial exam. Mohr concluded that except the fracture, Correll satisfactorily explained HH’s injuries. Mohr then recounted the varying and contradictory histories of HH’s bath provided by McCarthy and Correll, and asserted that HH’s

laboratory results were “completely inconsistent with the history of her never going under the water.” In Mohr’s view, HH had either been “held under the water in order for her to swallow that much water, or she was unconscious and swallowed that water due to near drowning in the bathtub.” Mohr emphasized, “she may have gotten under the water, became unconscious, but then was put to bed basically unconscious after she was found.”

OR’s kindergarten teacher, Karen Prafke-Morin, testified on behalf of Correll. Prafke-Morin described OR as “bubbly, friendly, outgoing” in the classroom, but also characterized OR as “very clingy” and unprepared for first grade. According to Prafke-Morin, OR frequently slept through class, “was having a lot of struggles just to get through a day,” and cried frequently. Prafke-Morin asserted that she had recommended to Raczkowski that OR be retained in kindergarten, but he disagreed. Prafke-Morin claimed that Raczkowski directed her to keep OR awake during class. Correll had visited the class on four occasions, Prafke-Morin recalled, and OR cried and was difficult to console when her mother left. Raczkowski, on the other hand, failed to attend any parent-teacher conferences.

Sue Ellen Pabst, a licensed social worker, also testified on Correll’s behalf. Pabst began counseling Correll in August 2011, and diagnosed post-traumatic stress disorder. Pabst opined that Correll had made good progress with therapy and expressed no concerns about her parenting ability. When questioned by the court regarding the circumstances of HH’s death and whether Correll could protect OR, Pabst stated, “I’m not concerned; I’m not concerned.”

Both Raczkowski and Correll testified at length and described their relationships with OR in positive terms. Raczkowski testified that OR came to him when good things happened to her, summarizing, “[s]he comes to show everything to her dad.” He claimed that she got along well and had fun with her step-siblings, and that he participated with OR in a variety of activities including roller and ice skating. Raczkowski admitted that Prafke-Morin had spoken with him about OR’s mental health, her sadness, and her sleepiness during class. Raczkowski initially claimed that OR had 20 counseling visits and that his insurance would not cover additional sessions, but later admitted that she had only seven visits and that counseling for his step-son consumed the other available sessions. Shortly before the trial, the DHS recommended that OR receive more counseling and Raczkowski agreed to obtain it, despite his personal belief that it was unnecessary.

Correll claimed that the DHS had never advised her that McCarthy constituted an obstacle to her custody of OR, and denied that she had ever been informed of the cause of HH’s death. Contrary to her testimony at the adjudication in the child protective proceeding, Correll declared: “the only thing that I ever heard from U of M or Gratiot is that they suspected Shaken Baby Syndrome. And that’s the only thing I’ve heard other than that the, another doctor said that her getting her immunization shot a week prior. . . .” Her direct-examination testimony continued:

Ms. Sniegowski: Do you feel at this time that you have a clear understanding of what it was that caused your daughter’s death?

Ms. Correll: No, I do not.

Ms. Sniegowski: Do you feel that you've been able to get a clear answer when you tried to talk to medical professionals about what caused your daughter's death?

Ms. Correll: No, I have not.

Ms. Sniegowski: Have you sought out additional opinions on what caused your daughter's death?

Ms. Correll: I have. I have actually sought out to talk to medical doctors actually out of state. My mother and I both have tried to reach out to get answers from anybody who can answer our questions, and nobody can.

Ms. Sniegowski: So has any, anything that you've done on your own or through DHS helped clarify what happened to [HH]?

Ms. Correll: No.

Ms. Sniegowski: And you had the opportunity today to hear what Doctor Bethany Mohr is saying?

Ms. Correll: Yes.

Ms. Sniegowski: And do you understand what her opinion is?

Ms. Correll: Yes.

Ms. Sniegowski: What, what are you[r] concerns or why would you just not take that at face value?

Ms. Correll: Because I called Matt on my way to pick up [OR], and it was after she had already been out of the bath. And the reason I know she's been out of the bath is because I received a text message that had a picture of her in the bath, and I called to see why she was in the bathtub. And he said that she had stuck her arm in the toilet so he put her in the tub. And I said, "Good job." And I heard her in the background laughing and jumping in her crib, and I said, "What is she doing now?" And he replied that he was trying to get her to take a nap because I had a schedule and it was her naptime. He said he tried to rock her, she didn't want to be rocked so now she's playing in her crib, hopefully she'll fall asleep. I picked up [OR], I came home, I got [OR] out of the car, I went into the house, I called my mom to discuss shoes with her, and [OR], I walked [OR] into the bedroom, I checked on [HH] and she was sleeping, and I walked out of the bedroom. So from the time that I got home until the time I was on the phone call, my daughter was alive and well. So I don't conclude [sic] with her opinion because she wasn't there to know what I know.

Correll testified that she had no concerns about leaving McCarthy with her children and asserted: "I would do it; I would leave any of my children with him."

The trial court questioned Correll concerning this testimony. Correll reiterated that she did not believe Dr. Mohr's testimony or that HH had drowned. In response to the court's questions, Correll recounted that McCarthy had been "texting on his phone" when HH slipped under the water "and he had pulled her up, brushed her face off, and he said that she screamed until she got out of the tub. And that was it." Correll maintained that she believed McCarthy's claim that HH had been underwater only "a brief second[.]"

McCarthy described the incident as follows:

I was at the sink in the bathroom. She was trying to stand up in . . . the bathtub. She was at the shallow end of the bathtub, and she slipped. She was climbing up, she slipped, and she fell down. And by the time her feet hit the other end of the bathtub, I had her out of the water.

McCarthy denied that HH had lost consciousness, had any trouble breathing, or appeared in any distress other than crying. He admitted that he "forgot" to tell Dr. Mohr that HH had slipped under the water.

McCarthy further admitted that in January 2011, he "los[t] [his] cool" and punched his ex-girlfriend's boyfriend in the nose. McCarthy pleaded guilty to an assault charge. As a result, he temporarily lost the ability to visit his son.

The trial court rendered a written opinion finding that OR's established custodial environment was with Correll, reasoning in relevant part as follows:

The mother was the primary physical custodian from the date of the divorce until the death of [HH] in February of 2011. Two workers from the Montcalm County DHS testified that [OR] had a strong bond with her mother and her teacher testified that when the Defendant mother came to school and it was time for her to leave, [OR] "was very sad and she had to be peeled off her mother". Testimony from her teacher as well as the Plaintiff father himself revealed that his wife had more contact with her teacher and a mental health counselor, than he did because of work. The sum total of the trial testimony demonstrates that [OR] naturally looked to her mother, from birth to February of 2011, for parental comfort and the necessities of life. Jessica Szczerowski from Montcalm County DHS testified that [OR] continually asked when she could go back to Mom after placement with Dad. This court finds that an established custodial environment exists with the mother and that the Plaintiff must provide clear and convincing evidence that a change of custody to him is in [OR]'s best interests.

The court found that the child's best interests would be served by returning her to Correll's primary custody. As discussed in greater detail later in this opinion, the court found that three best interest factors weighed in Correll's favor and that the parties were equal on the balance of the factors. Raczkowski now appeals.

III. STANDARD OF REVIEW

Our review of a circuit court's custody or parenting time decision is well settled. We must affirm "all orders and judgments of the circuit court" under the Child Custody Act (CCA) "unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error." MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). Our review is thereby limited:

Findings of fact, such as the trial court's findings on the statutory best-interest factors, are reviewed under the "great weight of the evidence" standard. Discretionary rulings, such as to whom custody is awarded, are reviewed for an abuse of discretion. An abuse of discretion exists when the trial court's decision is "palpably and grossly violative of fact and logic[.]" Finally, "clear legal error" occurs when a court incorrectly chooses, interprets, or applies the law. [*Dailey v Kloenhamer*, 291 Mich App 660, 664-665; 811 NW2d 501 (2011) (citations omitted).]

IV. ANALYSIS

A. ESTABLISHED CUSTODIAL ENVIRONMENT

Raczkowski first contends that the circuit court erred in finding that OR's established custodial environment existed only with Correll. The CCA "is intended to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593-594; 532 NW2d 205 (1995). A custodial environment "is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). Whether an established custodial environment exists is a question of fact to which the great weight of the evidence standard applies. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001).

An established custodial environment is "one of significant duration in which a parent provides care, discipline, love, guidance and attention that is appropriate to the age and individual needs of the child." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). "It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Id.* In evaluating whether an established custodial environment exists, the focus is on the care of the child during the time period preceding the custody trial. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995).

The trial court's finding that OR's established custodial environment resided solely with Correll contravened the great weight of the evidence. During most of the 17 months preceding the custody trial, OR lived with Raczkowski and his family. Unchallenged evidence supplied by the DHS workers and Raczkowski supported that during this time, OR looked to Raczkowski as well as to Correll "for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). OR's emotional bond with her mother, while undeniably strong, does not negate that for a substantial portion of the child's life, she resided with her father in a healthy, mutually-

beneficial relationship. The great weight of the evidence demonstrated that during the considerable time that OR lived with Raczkowski, the two shared a stable, secure and seemingly permanent association fulfilling the definition of an established custodial environment.

Nevertheless, the trial court's erroneous determination of OR's established custodial environment constitutes harmless error. Because OR had an established custodial environment with both parents, neither parent's established custodial environment could be disturbed absent clear and convincing evidence that a change served the child's best interests. *Foskett*, 247 Mich App at 8. Accordingly, the trial court did not err by requiring Raczkowski to clearly and convincingly prove that OR's best interests would be served by awarding him sole physical custody.

B. THE BEST INTEREST FACTORS

Raczkowski next contends that the trial court's findings regarding OR's best interests did not comport with the great weight of the evidence. Specifically, Raczkowski challenges the trial court's findings concerning best interest factors MCL 722.23(a), (b), (c), (d), (e), (f), (g), (j), (k) and (l), contending that the trial court's judgment on each contravened the great weight of the evidence. The trial court found that facts (a), (b) and (c) favored Correll and that the parties were equal in relation to the remaining factors. Our review of the record substantiates that the trial court's findings regarding factors (d), (e), (g), and (l) contravene the great weight of the evidence. Because the trial court failed to accurately evaluate McCarthy's role in HH's death, his domestic violence, and Correll's capacity to provide OR with a safe home environment, we reverse and remand for a new best interests hearing based on current information.

Factor (a) addresses the "love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). The trial court favored Correll on this ground, finding that while "[i]t is obvious that both parents love their daughter, . . . the testimony before the court establishes that the emotional bond between [OR] and her mother is stronger than with the father." Raczkowski argues that "[a] proper finding under this factor would be that the parties are equal," as the evidence supported that OR had an equally strong bond with her father. Our review of the evidence substantiates that OR and Correll shared an exceptionally strong emotional bond despite OR's lengthy placement outside of Correll's custody. The trial court's finding that this factor favored Correll was not against the great weight of the evidence.

Factor (b) concerns the "capacity and disposition" of the parents to provide the child with "love, affection, and guidance" and to continue the child's education and religious upbringing. MCL 722.23(b). The trial court relied heavily on Prafke-Morin's testimony in finding that this factor favored Correll. Prafke-Morin reported that OR's emotional turmoil interfered with her education and that Raczkowski was resistant to acknowledge the child's need for continued counseling. The trial court described Prafke-Morin's testimony as "insightful and concerning," and concluded: "it is clear to this court that the father does not appreciate the enormity of [OR's] loss and the absolute necessity of professional emotional intervention. He was in the position to do something about it and he did not and has not."

Raczkowski challenges this finding, arguing that OR's behavior at school was inconsistent with her behavior at home, that one of OR's counselors had advised that she no

longer needed any therapy, and that Prafke-Morin essentially facilitated OR's sleepiness by permitting the child to nap at will. The trial court found Prafke-Morin's testimony more compelling and more credible and we discern no basis to disturb this finding.³

In regard to factor (c), the capacity of the parties "to provide the child with food, clothing, medical care or other remedial care" and material needs, the trial court found troubling Raczkowski's previous child support deficiencies and his lack of support for OR's counseling. The court summarized, "Not to fully recognize and minimize [OR's] difficulties following the removal from her mother and the sudden deaths of two siblings demonstrates that the father is not properly responding to the remedial needs of his daughter. This factor favors the mother." Again, Raczkowski focuses his challenge to this finding on his contention that OR's need for counseling was not as acute as Prafke-Morin alleged. The trial court elected to credit Prafke-Morin's evaluation of OR's emotional needs rather than that of Raczkowski. Accordingly, the court's determination that factor (c) favored Correll did not contravene the great weight of the evidence.

Raczkowski next asserts that factors (d) and (e) favored him rather than being equal. These factors overlap somewhat. *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). Factor (d) concerns "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," while factor (e) addresses "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." Factor (e) requires a court to "weigh all the facts" bearing on which parent likely can best provide the child "the benefits of a custodial home that is marked by permanence, as a family unit." *Id.* at 466.

The trial court found the parties equal on both factors (d) and (e), finding as follows with regard to factor (d):

[OR] lived with her mother up until February 2011 when her sister died. There were apparently no problems up until that time that prompted the father to take any action to alter the custody arrangement. The father has a wife who has two children from a previous relationship and a son together. There was no testimony that the father's home is an inappropriate environment. This factor is equal.

Regarding factor (e) the trial court opined:

The father has been in a relationship with his wife since 2007 and the mother has been in a relationship with her boyfriend for approximately two years. The [DHS] has overseen the residences of both and it was testified to that both are appropriate. This factor is equal.

³ Based on Prafke-Morin's testimony regarding OR's school performance and OR's relatively short school career, the trial court found the parties equal in relation to factor (h) (the home, school and community record of the child). Raczkowski does not challenge the factual support for the court's conclusion in this respect.

Raczkowski contends that “maintaining [OR] with Plaintiff-Father would have been the correct decision to the desirability for maintaining continuity [under factor (d)],” given that at the time the trial court issued its opinion OR had lived with Raczkowski for 20 months. As to factor (e), Raczkowski argues that since the parties’ divorce, Correll has “been in multiple relationships with live-in partners . . . and moved herself and [OR] five times.” These facts, Raczkowski asserts, reflect that Correll “was far from a representation of a permanent family unit.”

The stability of Correll’s living arrangement is at the core of factors (d) and (e). As explained by our Supreme Court in *Ireland*, these factors do not require a court to explore the “acceptability of the home” at issue. *Id.* at 464 (quotation marks and citation omitted). Rather, the focus must remain on the stability of each environment and the likelihood that the competing environments would remain continuous. The great weight of the evidence supports that Correll’s living arrangements were markedly less stable than those of Raczkowski. After Correll and Raczkowski separated in 2007, Correll lived in five different places. She outlined the people with whom she resided as follows:

My mom, Lucky [Hatt], Matt [McCarthy], and Bambi. When I moved out of our home, I moved in with . . . a friend of mine, her name is Bambi, and [OR] and I lived there. And we moved out of there, and I rented a house. And then I quit my jobs and moved in with my mom. And then I moved in with Lucky and then Matt.

Correll explained that she met McCarthy in November 2010, while living with Hatt and moved in with McCarthy one month later. Correll had lived with McCarthy for 45 days before entrusting HH to his care. During that time, OR lived with her grandmother from Mondays through Thursdays to attend school.

Correll and McCarthy moved to Chicago in January 2011, and returned to live in Michigan after WH’s death. Syjud testified that if Correll was granted custody of OR, Syjud would recommend that DHS “continue to keep the case open, offer services, and if the barriers cannot be rectified in a timely manner . . . it would likely be recommended that another petition be filed for termination of parental rights.” Szczerowski testified similarly. In contrast, Raczkowski has lived with his wife and their children in the same location and without interruption since 2008.

These facts do not support the trial court’s conclusion that the parties’ homes presented equal opportunities for permanence or stability. Correll’s frequent moves and the apparent impermanence of her relationships contrast markedly with the stability and continuity of Raczkowski’s home environment. Furthermore, Correll’s decision to remain with McCarthy potentially subjected her to further scrutiny by the DHS, as explained by the DHS caseworkers. The great weight of the evidence contravened the trial court’s finding that the parties were equal with regard to factor (e).

Factor (f) concerns the parties’ “moral fitness.” This factor relates to a person’s moral fitness *as a parent*.” *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994) (emphasis in original). In *Fletcher*, the Supreme Court instructed that when evaluating this factor,

courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is *not* “who is the morally superior adult”; the question concerns the parties’ relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. [*Id.* (emphasis in original).]

Rackowski’s argument equates Correll’s failure to accept McCarthy’s responsibility for HH’s death with a moral shortcoming as a parent. While Correll’s inability or unwillingness to acknowledge McCarthy’s pivotal role in HH’s death bears on her fitness as a parent, we decline to characterize this as a “moral” failure. We similarly reject that Correll’s extramarital relationship with McCarthy is relevant to this factor. The trial court did not err in considering the parties equal on this ground.

Rackowski next claims that the great weight of the evidence contravened the trial court’s finding that best interest factor (g), “[t]he mental and physical health of the parties involved,” favored neither party. The trial court acknowledged that Pabst had diagnosed Correll as suffering from posttraumatic stress disorder, but minimized the importance of this diagnosis: “It is of no surprise to this court that a parent who suffers the deaths of two young children within a 12 month period of time would be so diagnosed.” The court further noted Pabst’s opinion that Correll “made good progress in dealing with the trauma in her life and that she had no concerns with [OR] being back in her mother’s care.” Although recognizing that Correll’s case service plan had required a psychological evaluation and counseling, the trial court observed that the Montcalm probate judge stated on the record of the child protective proceedings: “no case service plan has been ordered for several months now.” The trial court concluded, “Apparently, DHS was not concerned that any psychological issues continued to exist.”

The great weight of the evidence contradicts the trial court’s finding that the DHS lacked concerns regarding Correll’s “psychological issues” and that Pabst had given Correll a clean bill of mental health. Szczerowski specifically expressed “concerns . . . based on my review of the psychological assessment and the emotional stability and the lack of counseling that she has attained.” Syjud testified that although the probate court ceased ordering Correll to comply with her service plan, the DHS continued to recommend that she participate in counseling and in random drug screening based on her history of getting drunk or high on a weekly basis. Pabst, too, recognized that Correll had a history of drinking to excess. Although Correll had made therapeutic gains, Pabst recommended continued counseling. No evidence supported that Rackowski suffered from any physical or emotional health problems.

While the trial court apparently found Pabst more credible than Syjud or Szczerowski, even Pabst’s testimony supported that Correll’s on-going emotional issues remained unresolved and that she needed additional therapy. The great weight of the evidence contradicted the trial

court's conclusion that Correll had no ongoing psychological problems, thus rendering the parties equal on this factor.⁴

Next, Raczkowski asserts that the trial court improperly evaluated best interest factor (j), which addresses "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship" with the other parent. The trial court found the parties equal in this regard, discerning "no reasonable cause to believe that either party would intentionally fail to facilitate a close and continuing relationship with the other parent." Raczkowski challenges this finding by highlighting record evidence that Correll sometimes communicated by yelling and swearing. Other evidence, however, supported that Raczkowski also engaged in rude and intemperate communication. Raczkowski further maintains that Correll had previously prevented him from exercising parenting time, initiated two meritless CPS investigations, and withheld medical information concerning OR.

The trial court acknowledged the parties' intermittent difficulties with communication but found no reason to believe that the past problems would continue. We defer to the trial court's credibility determinations. *Fletcher*, 447 Mich at 890. The evidence supports the parties' equality regarding this factor.

MCL 722.23(k) addresses domestic violence, requiring the court to consider this factor "whether the violence was directed against or witnessed by the child." The trial court cited testimony indicating that McCarthy had assaulted the boyfriend of his ex-girlfriend and that OR had been "bitten numerous times at [Raczkowski's] home."⁵ The court concluded, "nothing was presented to justify the court in finding that this factor favors one party over the other. This factor is equal."

The trial court apparently concluded that McCarthy's prior assaultive act did not constitute domestic violence under MCL 722.23(k). The term "domestic violence" is not defined in the CCA, and we have located no authority that would support a conclusion that McCarthy's act may be correctly characterized as falling within the ambit of this factor, given that it occurred outside of OR's presence and was neither directed against nor witnessed by the child. Accordingly, we discern no error.⁶

⁴ In relation to factor (i), the court noted that it interviewed the child and took her expressed preference into consideration. Raczkowski does not challenge the court's treatment of this factor.

⁵ During the fall of 2007, Raczkowski's stepson, who is autistic, bit OR more than 12 times over the course of one week. The biting resulted in a CPS investigation which was closed as unsubstantiated.

⁶ This is not to say that McCarthy's assaultive behavior bears no relevance to a custody determination. As discussed next, factor (l) permits a trial court to consider evidence of this nature.

The last best-interest factor, (*I*), concerns “any other factor considered by the court to be relevant to a particular child custody dispute.” In addressing this factor the trial court considered Raczkowski’s argument that Correll “has chosen her boyfriend over [OR],” failed to address her mental health issues, and never acknowledged that McCarthy’s abuse or neglect caused HH’s death. The trial court commenced its factor (*I*) analysis by summarizing as follows the DHS workers’ testimony:

Jessica Szczerowski, Montcalm Co. Children’s Services Worker, . . . stated that the parent/agency agreement provided that the mother was to have a psychological exam and follow all recommendations and take a parenting class. She testified that her assessment was that [Correll] did not make enough progress and that she still has concerns about her emotional stability. Ms. Szczerowski also testified that reunification was prevented because [Correll] did not accept responsibility for her child’s death. This court never heard from this witness what she needed to do to “accept responsibility” and no service plan formulated by DHS or payment for counseling was occurring. The court presumes, but is not certain because she never said so, that she wanted some affirmative statement from [Correll] that that her boyfriend was responsible. [Correll] testified that she was never told by DHS that if she wanted custody of [OR] back she needed to part ways with Mr. McCarthy and that if that would have been a condition, she would have parted ways. This witness, during cross examination, said she personally supervised visits with [OR] and her mother and that these visits were always appropriate and they were very bonded with one another. Further, that “[OR] continued to ask when she could go back to Mom after placement with Dad”. In March of 2012, Ms. Szczerowski left the case and replaced by a CPS worker Kristina Syjud who testified that she was assigned to the case because her supervisor “felt that a fresh perspective was needed.” No explanation was given as to what that meant. She testified that the mother’s drinking and emotional stability were her primary concerns. She also said that the father has a very clean home, that [OR] has a strong bond with her mother and that the mother has not expressed any concerns about [OR’s] care while in her father’s care and that the mother said that they actually co-parent fairly well together.

The trial court then turned to “the alleged inconsistencies that surrounded the comments/statements of the mother and . . . McCarthy” regarding the circumstances of HH’s death. The court determined that it would not be “instructive to attempt to reconcile” the conversations and instead elected to address “those facts which are conclusive to this court as they were evidence presented in this proceeding[.]” The trial court summarized McCarthy’s testimony and Mohr’s opinions, concluding as follows:

This court believes that Mr. McCarthy failed to keep a watchful eye on [HH], that as a result she accidentally drowned, and he doesn’t have the courage to admit it. Shame and guilt would naturally flow from such an event, and perhaps such emotions are too much for him to own up to. The court, however, does not draw the conclusion that his failure to admit fault compels the finding that the mother is an inappropriate custodial parent and whose home is an unsafe environment for [OR] given her age.

Raczkowski contends that the trial court's emphasis on the accidental nature of HH's death ignores McCarthy's culpability, the risk that he poses to children, and the significance of Correll's election to remain with McCarthy despite those risks.

The trial court's analysis of factor (I), a "catch-all" provision, reflects several fundamental misapprehensions of the trial evidence. The trial court found that neither Szczerowski nor Syjud explained how or why Correll should have "take[n] responsibility" for HH's death and found that had this message been effectively communicated, Correll would have parted ways with McCarthy. However, both witnesses worked closely with Correll following HH's death and both expressed concern that Correll never acknowledged or recognized that McCarthy's negligence likely caused HH's death. Syjud testified that Correll had voiced no regret about leaving HH with McCarthy, and declared that even in retrospect, she would do the same thing.

Szczerowski indicated that reunification between Correll and OR had stalled due to "the lack of accepting responsibility for why her children came into care, you know, her child had died in the care of her boyfriend that she trusted . . . with her daughter." She pointed out that Correll had "allow[ed] somebody that she had met just for a couple of months take care of her children which ultimately led to medical neglect and the death of her child." Syjud similarly explained:

And our concerns with Ms. Correll remain the same that she still does not take responsibility for the abuse and neglect or understand that it was abuse and neglect that occurred that brought her children into care. And she doesn't understand that medical attention was needed while her daughter, [HH], was in the care of Mr. McCarthy, and that that failure led up to her death. And until she understands and takes responsibility for the reasons her children entered care, I don't feel like she's able to protect her children in the way that she would need to be able to.

Syjud later reiterated that Correll:

does not seem to take responsibility or understand that Mr. McCarthy needed to seek medical attention and has stated that she doesn't feel like he did anything wrong in those instances and that if she had to do it all over again, she would do the same things leaving her daughter in Mr. McCarthy's care where he did not appropriately seek medical attention after a drowning or near drowning that then resulted in her youngest daughter's death.

Consistent with this testimony, at the custody trial Correll disavowed that HH had drowned and voiced disbelief of Dr. Mohr's conclusions. Correll further denied "any concerns" about leaving McCarthy with her children, averring, "I would do it; I would leave any of my children with him." The trial court determined that because McCarthy's negligence rather than any on the part of Correll caused HH's death, McCarthy's actions did not render Correll's home "an unsafe environment" for OR.

In every custody dispute “the overwhelmingly predominant factor is the welfare of the child.” *Heid*, 209 Mich App at 595. The issues raised by Raczkowski with regard to factor (I) involved OR’s safety if allowed to return to Correll and McCarthy’s custody and care. As the statutory best interest factors do not specifically address the risks of physical harm or medical neglect that may attend one parent’s home environment, the trial court appropriately engaged in a safety analysis pursuant to factor (I).⁷ Although the trial court determined that McCarthy had not deliberately injured HH, it failed to address whether McCarthy’s previous actions, including his admission to having assaulted his ex-girlfriend’s partner and his failure to obtain medical care for HH, created a safety risk for OR. Given Correll’s clearly stated intent to remain with McCarthy and to allow him to care for OR, factor (I) required the court to consider and carefully assess whether, given McCarthy’s record of child neglect and violence, he could safely care for OR when tasked with this responsibility.

While a trial court’s exercise of discretion in custody disputes must be afforded great deference, the evidence in this case clearly preponderates against the trial court’s factual findings with regard to several factors that concern OR’s safety. Record evidence concerning factors (d) and (e), the permanence of a family home, (g), the parties’ mental health, and (I), which subsumes safety considerations not included in the other best interest factors, substantiated that in Correll’s custody OR potentially faced risks that were either ignored or inappropriately minimized by the trial court. Because the great weight of the evidence supported that the parties were not equal regarding these factors, we remand for a reevaluation of the custody determination. On remand, the trial court should consider up-to-date information in reviewing these factors, as well as any new information brought to the court’s attention involving the other best interest factors.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

⁷ The parenting time statute, MCL 722.27a(6)(c), provides that a court may consider whether there is a “reasonable likelihood of abuse or neglect of the child during parenting time.”